Dr Mohamad Afzal bin Farikullah Khan v Malaysian Medical Council

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24–82–07 OF 2016
KAMALUDIN MD SAID J
10 AUGUST 2017

Professions — Medical practitioner — Guilty of infamous conduct in professional respect — Whether plaintiff's conduct amounted to infamous conduct — Whether plaintiff breached Code of Professional Conduct — Whether defendant reached wrong decision simply because failed to mention standard of proof in finding — Whether sentence of suspension of six months grossly unjust — Medical Act 1971 ss 29(2)(b), 30 & 31

The plaintiff was a registered medical practitioner under the Medical Act 1971 ('the MA'). The defendant, the Malaysian Medical Council ('the MMC') was a statutory corporate body established under s 3 of the MA to perform the duties and functions and exercise the powers provided under the MA.There was a complaint lodged against the plaintiff by one Mohd Syukor bin Azizan ('the complainant'). On 9 August 2010, the complainant consulted the plaintiff with a complaint of left scrotal swelling. The plaintiff made a provisional of spermatocele with a different diagnosis of scrotal lipoma and gave the complainant a choice between conservative treatment and a surgical procedure but recommended the latter to which the complainant agreed on after consulting his wife. On 10 August 2010, a scrotal exploration was undertaken by the plaintiff and on the next day the plaintiff recommended for the discharge of the complainant. The complainant refused as he was still in pain. On 12 August 2010, the plaintiff referred the complainant to one Dr Yaakob as the complainant felt pain on his left leg. On 14 August 2010 the complainant was discharged and returned for physiotherapy on 18 August 2010 whereby he accidentally saw the plaintiff and informed that he was still in pain. The plaintiff was in denial saying that it was not true. The following days, the pain was severe that the complainant could not sleep and his wife informed the plaintiff of this condition but the plaintiff was still in denial. On 20 August 2010 the plaintiff referred the complainant to one Dr Anuar who then admitted the complainant to the hospital due to an infection at the site of surgery. The complainant complained to the hospital and asked for his medical report to enable him to get a second opinion. The report ('the first report') was given to the complainant and on 28 December 2010, the complainant consulted Dr Zuraida Ahmad, a psychiatric at the Mental Health Department of Bukit Mertajam Hospital. The report issued on 16 February 2011 by Dr Zuraida showed that the complainant did not have a serious mental illness

and did not exhibit symptoms of Munchausen syndrome. This was contrary to the first report issued to the complainant.The complainant then lodged a complaint. On 21 December 2015 after the five days inquiry by the Preliminary Investigation Committee the defendant issued a charged of an infamous conduct against the plaintiff stating among others that the plaintiff had on 21 September 2010 signed and given untrue, misleading or improper report contrary to section 2.1.4 of the Malaysian Medical Council's ('MMC') Code of Professional Conduct ('the Code') and/or demonstrated unprofessional behavior in the preparation of the said report neglected or disregarded his professional responsibilities contrary to section 1.1 of the Code. The defendant by way of the MMC order dated 21 June 2016 had found the plaintiff guilty of infamous conduct under s 30 of the MA and sentenced the plaintiff to a period of six months' suspension from the Malaysian Medical Register ('the register'). Being dissatisfied with the decision, the plaintiff brought the present appeal under s 31 of the MA by way of originating summons. The crux of the appeal was in relation to the meaning of 'infamous conduct' in a professional respect under s 29(2)(b) of the MA.

Held, affirming the finding of guilt by the defendant on the plaintiff and varying the order on punishment by substituting the suspension of six months from the register to one month:

(1) It was clear that for a finding of infamous conduct based on any statement made in a report, it must be found that the statement was either untrue, misleading or improper. The defendant had established that the report contained the statement that the plaintiff was suffering from marital problem, and a diagnosis of Munchausen syndrome was very likely. It had been established also that the report was not a referral letter to be given to a particular specialist. Therefore, the defendant was not wrong in holding that the plaintiff had failed to exercise scrupulous care in preparation of such a report (see paras 45–46).

(2) The plaintiff had clearly breached the code when the plaintiff as the urologist and not trained or exposed in psychiatry field had made a statement that the complainant was suffering from a Munchausen syndrome. Accordingly, the plaintiff could not make a diagnosis not within his field of specialty and should not have stated that the complainant had a marital problem solely by relying on the complainant's statements to the plaintiff. The court agreed with the defendant that the record showed that the plaintiff had clearly admitted that such statement was not made in his professional opinion and the intention to alert the next physician was never demonstrated in his report (see paras 54–55).

(3) In the present case, the defendant had carefully considered the oral and documentary evidence and made firm findings of facts based on the

evidence presented before it. It could not be said that the defendant had reached a wrong decision simply because it failed to mention the standard of proof in its finding. The defendant's decision on the finding of guilt of the plaintiff was justified taking into account the evidence as a whole (see paras 60–61).

(4) It was not disputed that the plaintiff was found guilty of infamous conduct mainly because the report had various statements which were unsubstantiated, misleading and/or improper. In the circumstances of the plaintiff's case and after considering that this was the plaintiff's first case and he had given his assurance that he would exercise caution in preparing medical reports in the future and being remorseful, it did not warrant a suspension of six months from the register. The sentence was reduced to one month's suspension from the register (see para 67).

[Bahasa Malaysia summary

Plaintif merupakan seorang pegawai perubatan yang berdaftar di bawah Akta Perubatan 1971 ('Akta'). Defendan, Majlis Perubatan Malaysia ('MPM') merupakan sebuah badan korporat yang ditubuhkan di bawah s 3 Akta untuk menjalankan tugas dan kuasa yang termaktub dalam Akta. Terdapat satu aduan telah dibuat terhadap plaintif oleh Mohd Syukor bin Azizan ('pengadu'). Pada 9 Ogos 2010, pengadu telah berjumpa dengan plaintif mengenai masalah bengkak pada sebelah kiri skrotum. Plaintif kemudiannya melakukan beberapa ujian spermatocele melalui beberapa ujian diagnosis yang dijalankan terhadap lipoma scrotal. Plaintif kemudian memberi pilihan kepada pengadu untuk memilih sama ada untuk menjalani rawatan konservatif atau menjalani pembedahan. Plaintif lebih cenderung supaya pengadu menjalani pembedahan. Pengadu bersetuju untuk menjalani pembedahan setelah berbincang dengan isteri. Pada 10 Ogos 2010, satu pemeriksaan scrotal telah dijalankan oleh plaintif terhadap pengadu dan pada keesokan harinya, pengadu dibenarkan untuk keluar daripada hospital setelah disarankan oleh plaintif. Pengadu menolak saranan plaintif kerana pengadu masih berasa sakit. Pada 12 Ogos 2010, plaintif merujuk pengadu kepada Dr Yaakob disebabkan pengadu masih berasa sakit pada kaki sebelah kiri. Pada 14 Ogos 2010, pengadu telah keluar daripada hospital dan kembali pada 18 Ogos 2010 untuk menjalani sesi psikoterapi. Pada sesi psikoterapi tersebut, pengadu dengan tidak sengaja berjumpa dengan plaintif dan memaklumkan kepada plaintif tentang kesakitan yang masih dialami. Plaintif kemudian menafikan apa yang diperkatakan oleh pengadu. Pada hari-hari berikutnya, kesakitan yang dirasai pengadu menjadi semakin teruk sehingga menyebabkan pengadu tidak boleh tidur tetapi plaintif menyangkal kenyataan yang dibuat oleh pengadu. Pada 20 Ogos 2010, pengadu datang untuk berjumpa dengan plaintif di mana plaintif masih lagi mengatakan pembedahan yang dilakukan plaintif sebelum ini adalah sempurna. Plaintif kemudian merujuk pengadu kepada Dr Anuar. Dr Anuar kemudian menyarankan agar pengadu untuk dimasukkan ke

hospital disebabkan berkemungkinan pengadu akan menjalani pembedahan. Pengadu kemudian membuat aduan kepada pihak hospital dan meminta laporan perubatan bagi membolehkan pengadu untuk memperoleh pendapat kedua selain daripada menjalani pembedahan. Laporan perubatan ('laporan pertama') telah diserahkan kepada pengadu dan pada 28 Disember 2010, pengadu telah berjumpa dengan Dr Zuraida Ahmad, pegawai psikiatrik Bahagian Kesihatan Mental di Hospital Bukit Mertajam. Laporan perubatan pada 16 Februari 2012 yang dikeluarkan oleh Dr Zuraida menunjukkan pengadu tidak mengalami masalah mental yang serius dan pengadu tidak mengalami simptom sindrom munchausen. Laporan perubatan yang dikeluarkan ini bercanggah dengan laporan pertama. Pengadu kemudiannya membuat aduan. Pada 21 Disember 2015 iaitu selepas lima hari siasatan dijalankan oleh Jawatankuasa Siasatan Awal, plaintif telah didakwa atas kesalahan melakukan perbuatan buruk terhadap plaintif dengan mengatakan plaintif pada 21 September 2010 telah memberi dan mengesahkan laporan perubatan yang tidak benar, cacat dan tidak sempurna kepada pengadu bertentangan dengan seksyen 2.1.4 Kanun Perlakuan Prosfesional MPM ('Kanun') dan mengabaikan tanggungjawab secara professional iaitu menyediakan laporan perubatan yang bertentangan dengan seksyen 1.1 Kanun. Defendan, pada 21 Jun 2016, telah memutuskan plaintif bersalah atas kesalahan melakukan perbuatan buruk di bawah s 30 Akta dan menjatuhkan hukuman pergantungan selama enam bulan daripada Pendaftar Perubatan Malaysia ('PPM'). Tidak berpuas hati dengan keputusan yang telah dibuat, plaintif kemudiannya membuat rayuan di bawah s 31 Akta melalui saman pemula. Rayuan ini berkaitan dengan definisi perlakuan buruk dari segi professional di bawah s 29(2)(b) Akta.

Diputuskan, mengekalkan keputusan defendan yang memutuskan plaintif bersalah dan mengubah hukuman pengantungan enam bulan oleh pendaftar kepada satu bulan pergantungan:

(1) Adalah jelas dalam menentukan adanya perlakuan buruk berdasarkan mana-mana kenyataan dalam laporan perubatan yang dibuat mestilah didapati tidak benar, cacat atau tidak sempurna. Defendan telah menunjukkan laporan perubatan yang mengatakan plaintif telah mengalami masalah rumah tangga dan simptom sindrom Munchausen. Adalah ditunjukkan bahawa laporan perubatan tersebut bukannya satu surat rujukan untuk diberikan kepada pakar-pakar tertentu. Oleh itu, adalah tidak salah bagi defendan untuk mengatakan plaintif gagal menjalankan tugas dalam menyediakan laporan perubatan (lihat perenggan 45–46).

(2) Plaintif dengan jelas melanggar Kanun apabila plaintif sebagai seorang urologist dan bukannya mahir dalam bidang psiktrik telah membuat satu kenyataan bahawa pengadu telah mengalami simptom sindrom Munchausen. Plaintif tidak boleh melakukan ujian perubatan di luar

bidang kepakaran dan plaintif tidak sepatutnya mengatakan pengadu mengalami masalah rumah tangga dengan hanya bersandarkan kenyataan yang diberikan oleh pengadu. Mahkamah bersetuju dengan defendan rekod jelas menunjukkan bahawa kenyataan yang dibuat oleh plaintif adalah di luar kepakaran plaintif sebagai seorang professional dan niat plaintif untuk memberi peringatan kepada ahli fisik tidak pernah ditunjukkan dalam laporan perubatan (lihat perenggan 54–55).

(3) Dalam kes semasa, defendan telah mengambil kira keterangan secara lisan dan secara bertulis dan defendan telah membuat keputusan berdasarkan keterangan-keterangan yang ada. Adalah tidak benar untuk mengatakan defendan telah membuat keputusan yang salah hanya kerana defendan gagal menunjukkan standard pembuktian dalam membuat keputusan. Keputusan yang dibuat defendan adalah betul berdasarkan bukti-bukti dan keterangan-keterangan yang dirujuk secara menyeluruh (lihat perenggan 60–61).

(4) Adalah tidak menjadi pertikaian bahawa plaintif telah didapati bersalah atas perlakuan buruk disebabkan laporan perubatan yang dikeluarkan plaintif adalah tidak benar, cacat dan tidak sempurna. Melihat kepada keseluruhan kes plaintif, setelah mengambil kira ini adalah kes pertama plaintif dan plaintif berjanji untuk lebih berhati-hati dalam menyediakan laporan perubatan serta faktor yang mengatakan plaintif menyesal dan sedar akan kesilapan yang telah dilakukan, hukuman enam bulan pergantungan terhadap plaintif oleh pendaftar tidak sepatutnya dikenakan. Oleh itu, hukuman pergantungan tersebut dikurangkan kepada pergantungan selama satu bulan (lihat perenggan 67).]

Notes

For a case on guilty of infamous conduct in professional respect, see 10(2) *Mallal's Digest* (5th Ed, 2017 Reissue) para 1948.

Cases referred to

Chong Chen Foh v Tan Lai Soon [2012] MLJU 1345; [2013] 2 CLJ 78, HC (refd)

Dr Koay Cheng Boon v Majlis Perubatan Malaysia [2012] 3 MLJ 173, FC (refd)

Dr Siti Aishah binte Abdullah v Majlis Perubatan Malaysia [2011] 8 MLJ 845, HC (refd)

Felix v General Dental Council [1960] 2 All ER 391; [1960] AC 704, PC (refd)

Joseph Francis Lopez, Re [1976] 1 MLJ 161 (refd)

Keith Sellar v Lee Kwang Tennakoon v Lee Kwang [1980] 2 MLJ 191, FC (refd)

Libman v General Medical Council [1972] AC 217, PC (refd)

Low Cze Hong v Singapore Medical Council [2008] 3 SLR 612, HC (refd)

Marzaini bte Zainuddin v Majlis Peguam Negara [2007] 8 MLJ 697; [2007] 10 CLJ 339, HC (refd)

Mohan a/l Rajadurai v Majlis Perubatan Malaysia [1997] MLJU 236; [1998] 1 CLJ 903, HC (refd)
Wong Kok Chin v Singapore Society of Accountants [1990] 1 MLJ 456, HC (refd)

Legislation referred to

Medical Act 1971 ss 3, 29(2), (2)(b), 30, 30(1)(b)(i), (1)(b)(ii), (1)(b)(iii), (1)(b)(iv), 31, 31(1), 32(2), 33
Medical Regulation 1974 r 31(6)

Robert Lazar (Aarthi Jeyaraj with him) (Shearn Delamore & Co) for the appellant.
Harjinder Kaur (Gowri Chandran with her) (Revathi & Partners) for the respondent.

Kamaludin Md Said J:

INTRODUCTION

[1] The plaintiff is a registered medical practitioner under the Medical Act 1971. The defendant, the Malaysian Medical Council ('MMC'), is a statutory corporate body established under s 3 of the Medical Act 1971 ('the MA') to perform the duties and functions and exercise the powers provided under the Medical Act 1971.

[2] The defendant by way of the MMC order dated 21 June 2016 has found the plaintiff guilty of infamous conduct under s 30 of the MA and sentenced the plaintiff to a period of six months' suspension from the Malaysian Medical Register.

[3] Being dissatisfied with the decision, the plaintiff brought this appeal under s 31 of the MA by way of originating summons dated 20 July 2016 and sought the following reliefs:

(a) the order granted on 21 June 2016 by the defendant against the plaintiff pursuant to s 30 of the MA whereby the plaintiff was found guilty of infamous conduct and therefore suspended for six months from the Malaysia Medical Register, be set aside/reversed;

(b) alternative the order being altered; and

(c) costs and other reliefs that the court think fit.

GROUNDS OF APPEAL

[4] The appeal is premised on the following grounds, inter alia, that:

(a) the defendant was erroneous in facts and law in its finding of guilt of the presented charge when the burden of proof should be of high standard and that the defendant had failed to prove the case against the plaintiff;

(b) the defendant had failed to consider the plaintiff's defense and that the testimony by the complainant was not supported by any evidence tendered during the investigation;

(c) the defendant had failed to appreciate that the medical report dated 21 September 2010 issued by the complainant was based on the clinical and pre-clinical information readily available for the plaintiff when the treatment was conducted; and

(d) the defendant did not take into account that in the medical report by the plaintiff, the complainant was diagnosed with Munchausen syndrome which would require further examination and evaluation, and this had been explained by the plaintiff in the investigation.

THE DEFENDANTS OPPOSED THE APPEAL

[5] The defendant opposed the plaintiff's appeal and contending that the appeal is without merits. The defendant's case is that the plaintiff was found guilty of infamous conduct including irrelevant and/or improper statement in his medical report on the complainant's condition for which the plaintiff has signed untrue, misleading or improper report contrary to section 2.1.4 of the defendant's Code of Professional Conduct. The defendant is comprising of doctors, specialist, professors etc who questioned the plaintiff during the inquiry in depth detailed and very medical in nature.

[6] The defendant's council members are the most appropriate persons to assess the plaintiff in this regard. The defendant's decision was justified taking into account the evidence as a whole and the punishment is a six months of suspension for the plaintiff's infamous misconduct. In addition to that with the vast collectible medical expertise between the members of the defendant at the inquiry, those are the correct person to assess and punish the plaintiff.

[7] The defendant prays that the plaintiff's appeal be dismissed with costs.

FACTS OF CASE

[8] There was a complaint lodged against the plaintiff by one Mohd Syukor bin Azizan.

[9] Mohd Syukor saw the plaintiff in the hospital on 9 August 2010 with a complaint of left scrotal swelling. The plaintiff made a provisional of spermatocaele with a different diagnosis of scrotal lipoma and gave him a

choice between conservative treatment and a surgical procedure but recommended the letter to which the complainant agreed on after consulting his wife.

[10] On 10 August 2010, a scrotal exploration was undertaken by the plaintiff and on the next day the plaintiff saw him and recommended his discharge. The complainant refused to discharge as he was still in pain.

[11] On 12 August 2010 the plaintiff referred the complainant to one Dr Yaakob as he complained a pain on his left leg.

[12] On 14 August 2010 the complainant was discharged and returned for physiotherapy on 18 August 2010 whereby he accidentally saw the plaintiff and informed that he was still in pain. The plaintiff was in denial saying that it was not true.

[13] The following days, the pain was severe that the complainant could not sleep and his wife informed the plaintiff of this condition but the plaintiff was still in denial.

[14] On 20 August 2010 the complainant came to see the plaintiff to which the plaintiff was still in denial (saying that the operation was perfect), the plaintiff referred the complainant to one Dr Anuar who then admitted the complainant to Hospital on 23 August 2010 to an infection at the site of surgery.

[15] The complainant complained to the hospital thereby the meeting was held on 2 September 2010 attended by the plaintiff and other officers of the hospital. The complainant asked for his medical report to enable him to get a second opinion. The report was ready in a week's time.

[16] The *report dated 21 September 2010 prepared by the plaintiff* stated that:

(a) *The patient repeatedly refused discharged claiming that he hasn't comfortable and need to stay to maximize his insurance claim. This was confessed by the complainant on 14 August 2010 after he was discharged.*

(b) *I also feel uncomfortable to continue managing him since he has been harassing and making advances to my clinic nurse. Furthermore, since he has officially complaint to the hospital management about his dissatisfaction over the treatment while under my care, it is best he seeks his treatment elsewhere.*

(c) *I also believe that he would benefit from counseling from a psychiatric. Apparently, he is suffering from marital problem, and a diagnosis of Munchausen syndrome is very likely.*

[17] On 28 December 2010, the complainant saw Dr Zuraida Ahmad a psychiatric at the Mental Health Department of Bukit Mertajam Hospital. The report issued on 16 February 2011 by Dr Zuraida showed that the complainant did not have a serious mental illness and did not exhibit symptoms of Munchausen syndrome.

[18] The complainant then lodged a complaint on the issues of:

(a) the plaintiff did not take his complaint on post-surgical issues seriously and asked the complainant to seek treatment elsewhere;

(b) that the plaintiff wrote in his report on 21 September 2010 that the complainant had refused to be discharged because he wanted to maximise his insurance claim; and further stated Munchausen syndrome in the report therefore the insurance company refused to cover the costs; and

(c) that the plaintiff alleged the complainant had harassed his nurse.

[19] On 21 December 2015 after the five days inquiry by the Preliminary Investigation Committee ('PIC') the defendant issued a charged of an infamous conduct against the plaintiff stating among others that the plaintiff had on 21 September 2010 signed and given untrue, misleading or improper report contrary to section 2.1.4 of the Malaysian Medical Council's ('MMC') Code of Professional Conduct and/or demonstrated unprofessional behavior in the preparation of the said report neglected/disregarded his professional responsibilities contrary to section 1.1 if the said Code.

[20] On 9 May 2016, the plaintiff was notified of the findings by the defendant:

(a) the report was not a referral letter to be given to a particular specialist;

(b) the content of the report has various statements which are unsubstantiated, misleading and/or improper eg marital problem and Munchausen syndrome; and

(c) failed to exercise scrupulous care in preparation of such a report.

[21] The plaintiff engaged a lawyer and submitted his mitigation on 21 June 2016 to state that:

(a) he is the sole breadwinner for the family and he is the only urologist in Penang (mainland) and this is the plaintiff's first case since his housemanship in 1995;

(b) the charge against the plaintiff is related to the contents of a medical report that was issued to the complainant hence the choice of words could not perfect; and

(c) the plaintiff was remorseful and regretted that the contents of the report had been misconstrued and that there is no malice intended.

[22] The defendant by way of the MMC order found the plaintiff guilty of infamous conduct under s 30 of the MA 1971 and sentence the plaintiff to a period of six months' suspension from Malaysian Medical Register.

THE PLAINTIFF'S SUBMISSION

[23] The plaintiff grounded his appeal on the following grounds:

(a) there is a procedural impropriety as r 31(6) of the Medical Regulation 1974 required the grounds to be given by the defendant in which case the defendant had failed to do so despite making a finding of guilt;

(b) the statement in the report does not constitute an infamous conduct; and

(c) the report was issued based on the best information available to the plaintiff.

[24] In his written submission, the plaintiff submitted that the finding of the defendant in the letter dated 9 May 2016 is flawed for the following three reasons which can be summarised as follows:

First ground — The report was not a referral letter to be given to a particular specialist

[25] The plaintiff contended that the code of conduct does not distinguish a referral letter from a report. The report dated 21 September 2010 was not addressed to any one in particular, therefore it was not referral letter and it was deemed to be a 'report'. The report was not addressed to any specialist in particular as it was issued upon the request of the complainant wanted to be referred to for a second opinion. Therefore, this cannot be a ground to support the finding of infamous conduct against the plaintiff.

Second ground — The content of the report has various statements which are unsubstantiated, misleading and/or improper eg marital problem and Munchausen syndrome

[26] The plaintiff submitted that in the report the plaintiff had suggested that the complainant 'would benefit from counselling from a psychiatrist'. The plaintiff in support of this statement, did not make a definite diagnosis in this

regard, but stated that '*Apparently*', he is suffering from a marital problem and a diagnosis of Munchausen syndrome is *very likely*'. The purpose of the statement in the medical report was for the complainant to be assessed by a psychiatrist *and the plaintiff did not make any confirmed diagnosis of Munchausen syndrome.*

[27] The plaintiff's *sole intention* was to have the complainant *reviewed and assessed further.* However, the plaintiff admitted during inquiry that the choice of words may not have been the best. The intention of the report was to alert the next treating physician that none of the previous clinicians could explain why the complainant had different type of pain, which is unusual in their combined clinical practice. Therefore, the defendant's finding is baseless and cannot substantiate a finding or guilt of infamous conduct against the plaintiff. The reason for stating that the complainant had marital problems was based on the fact that the complainant personally told the plaintiff 'who doesn't have a marital problem'.

[28] To the plaintiff, this issue is relevant to the psychiatrist to evaluate and assess the complainant. Therefore, the plaintiff saw it fit to include in the report. In his report, the plaintiff has used the word 'apparently' to demonstrate this what he has been told by the complainant. The defendant seems to have misinterpreted the statement made by the plaintiff. As such, there was nothing improper, untrue or misleading about the statement.

Third ground — Failed to exercise scrupulous care in preparation of such a report

[29] The plaintiff submitted that the content of the medical report was based on clinical and para-clinical information that were available to the plaintiff. There was no malice in what the plaintiff had written and it was for the well-being of the complainant. If the plaintiff had such malicious intention as alleged by the complainant and/or the defendant, the plaintiff would have complained to the insurance company or to the complainant's employer.

THE DEFENDANT'S SUBMISSION

[30] On the other hand, the defendant submitted that the plaintiff had admitted that the choice of words used in the medical report may not been the best.

[31] The plaintiff had clearly breached the code of professional conduct when the plaintiff as a urologist and not trained or exposed in psychiatry field had made statement that the complainant is suffering from Munchausen syndrome. Accordingly, the plaintiff cannot make a diagnosis not within his

field of specialty and should not have stated that the complainant has a marital problem.

[32] The defendant further submitted that when it comes to a specific profession, a man should be assessed by its 'own peers' and not the court by following the procedures.

[33] The plaintiff has neither call Ms Azni nor adduce any police report or any formal complaint to the hospital management that is allegedly made by Ms Azni (the plaintiff's nurse) at any material time in respect of the sexual harassment and which was also part of the plaintiff's defence during the inquiry.

OPINION OF THIS COURT

[34] This court heard the oral submissions from both the plaintiff and the defendant and also reading their written submissions with the authorities filed and cited therein and adjourned the decision on 10 August 2017.

[35] Having considered the plaintiff's appeal and perused the records in the affidavits filed herein, this court was of the view that the defendant had arrived into the correct finding of guilt of the plaintiff on charged of infamous conduct in a professional respect under s 29(2) of the MA and punishable under s 30 of the same Act.

[36] It is not disputed that the Charge against the plaintiff was for 'infamous conduct' in a professional respect under s 29(2)(b) of the MA which reads as follows:

> (2) The Council may exercise disciplinary jurisdiction over any registered person who —
>
> ...
>
> (b) has been guilty of infamous conduct in any professional respect:

[37] Pursuant to the finding of guilt by the defendant, the MMC order to suspend the plaintiff for a period of six months pursuant to s 33 of the MA which reads as follows:

> The Council may, in the exercise of its disciplinary jurisdiction, impose any of the following punishments —
>
> (i) order the name of such registered person to be struck off from the Register;
>
> (ii) order the name of such registered person to be suspended from the Register for such period as it may think fit;

(iii) order the registered person to be reprimanded; or

(iv) make any such order as aforesaid but suspend the application thereof, subject to such conditions as the Council may think fit, for a period, or periods in the aggregate, not exceeding two years;

and may, in any case, make such order as the Council thinks fit with regard to the payment of the costs of the Registrar and of any complainant or of the registered person, and any costs awarded may be recovered as a civil debt.

[38] This court acts as an appellate court under s 31 of the MA and it provides that any decision by the High Court *shall be final*.

[39] The crux of the appeal in centered on the meaning of *'infamous conduct' in a professional respect under s 29(2)(b) of the MA*. The plaintiff argued that the statement 'I also believe that he would benefit from counselling from a psychiatric. Apparently, he is suffering from marital problem, and a diagnosis of Munchausen syndrome is very likely' in the report is nothing improper, untrue or misleading about it. It was submitted that the defendant, in this regard, has got it completely wrong. The word 'apparent' was never meant and could not have meant that the plaintiff was 'very sure' that the complainant had marital problems. The use of the word 'apparent' taken in its literal context, was exactly the way the plaintiff had described it, that he had been told by the complainant that he had marital problems. As such, again, there was nothing improper, untrue or misleading about this statement. Most importantly, the defendant has failed to make a finding as to why this statement made by the plaintiff was unsubstantiated, untrue, improper or misleading. Therefore, it cannot be used as a ground to support a finding of infamous conduct against the plaintiff.

[40] Further, it was submitted that the defendant in finding the plaintiff guilty, was that he allegedly 'failed to exercise scrupulous care in preparation of the medical report'. There is nothing that was stated during the course of proceedings, nor when the decision by the defendant was made, to indicate the manner in which the defendant came to this finding. There were no reasons given to demonstrate how the plaintiff had allegedly failed to exercise scrupulous care in the report, given that the plaintiff has explained the basis of his report and the facts that he had relied on. There was nothing untrue, improper or misleading in the report to suggest that the plaintiff failed to exercise *scrupulous care* in preparing the report.

[41] In this regard, I must refer to Part II of the Code of Professional Conduct by the Malaysian Medical Council ('Code of Conduct') sets out the meaning of 'infamous conduct', as follows:

The phrase 'infamous conduct in a professional respect' was defined in 1894 by

Lord Justice Lopez as follows:

> If a medical man in the pursuit of this profession has done something with regard to it which will be reasonably regarded as *disgraceful or dishonorable* by his professional brethren of good repute and competency, then it is open to the General Medical Council, if that be shown, to say that he has been guilty of infamous conduct in a professional respect.

In another judgement delivered in 1930, Lord Justice Scrutton stated that:

Infamous conduct in a professional respect means no more than *serious misconduct* judged according to the rules, written or unwritten, governing the profession.

[42] The Code of Conduct also sets out guidelines for a practitioner in relation to medical reports issued:

7. Medical Records and Reports

Good medical records are an indication of good practice. The doctor is encouraged to record all relevant details of his management of a patient. Accurate, legible, comprehensive and contemporaneous notes are advised. Doctors have obligations relating to the storage, access and use of health information available in the patients' records.

The patient is entitled to a written report of the care that has been given to him. The doctor is obligated to provide him such a report speedily, without any unreasonable delay. The withholding of information of the care given to the patient is unethical.

The doctor can be held responsible for any breaches of confidentiality of medical records. Medical information can be released to a third party only when written consent has been given by or on behalf of the patient. Third parties who frequently seek information from a doctor are employers who request reports on the medical condition of absent or sick employees, insurance companies requiring particulars about the history of proposers for life assurance or deceased policy holders, medical boards and other agencies seeking medical information about individuals associated with it as well as solicitors to consider and assess claims. Fees may be charged for medical reports or opinions requested by third parties.

Where medical information is sought, the doctor should make it a rule to refuse to give any information in the absence of the written consent of the patient or the competent relative.

[43] In the present case the charge of an infamous conduct against the plaintiff is stated among others that the plaintiff had on 21 September 2010 signed and given untrue, misleading or improper report contrary to section 2.1.4 of the Malaysian Medical Council's (MMC) Code of Professional Conduct and/or demonstrated unprofessional behaviour in the preparation of the said report neglected/ disregarded his professional responsibilities contrary to section 1.1 of the said code (Responsibility by Standard of Medical Care to Patients).

[44] The code of conduct deals with the *obligations* of medical practitioners when issuing reports or other documents of the same character of which section 2.14 provides as follows:

> 2.1.4 Certificates, Notifications, Reports, etc.
>
> Registered practitioners are in certain cases bound by law to give, or may from time to time be called upon or requested to give particulars, notifications, *reports and other documents* of a kindred character, signed by them in their professional capacity, for subsequent use either in the Courts or for administrative purposes.
>
> Practitioners are expected by the Council to exercise the most scrupulous care in issuing such documents, especially in relation to any statement that a patient have been examined on a particular date. Any registered practitioner who shall be proved to the satisfaction of the Council to have signed or given under his name and authority any such certificate, notification, report or document of a kindred character, which is *untrue, misleading or improper*, will be liable to disciplinary punishment.

[45] Therefore, based on section 2.14, it is clear that for a finding of infamous conduct based on any statement made in a report, it must be found that the statement is either *untrue, misleading or improper*. The defendant had established that the report contains the statement that the plaintiff is suffering from marital problem, and a diagnosis of Munchausen syndrome is very likely. It has been established also that the report was not a referral letter to be given to a particular specialist. Therefore, on the established facts, my view is that the defendant was not wrong in holding that the plaintiff had failed to exercise scrupulous care in preparation of such a report.

[46] The severity of a finding of infamous conduct can be gleaned from the definition of 'infamous conduct' as set out in the case of *Felix v General Dental Council* [1960] 2 All ER 391; [1960] AC 704 which states as follows:

> *It must, of course, be remembered that in the present case the words 'infamous or disgraceful conduct' should be construed in conjunction with the words 'in a professional respect'*; and we were referred in this connection to the well-known case of *Allinson v General Council of Medical Education and Registration* where an injunction was sought by a medical practitioner against the defendant council from allowing his name to remain struck out from the medical register kept by the defendant council under the Medical Act, 21 and 22 Vict c 90. By section 29 of that Act the name of any medical practitioner judged after due inquiry by the council 'to have been guilty of infamous conduct in any professional respect' was liable to be erased from the register. The plaintiff's name having been so erased he brought his action for an injunction to the effect above mentioned, claiming that the proceedings leading to the erasure of his name were void on the ground (inter alia) that there was no evidence on which the council could reasonably find that the plaintiff had been guilty of 'infamous conduct in any professional respect'. This contention was rejected by Collins J and the Court of Appeal, and Lord Esher said this: 'I adopt the

definition which my brother Lopes has drawn up of at any rate one kind of conduct amounting to 'infamous conduct in a professional respect', viz: *'If it is shown that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency*', then it is open to the General Medical Council to say that he has been guilty of 'infamous conduct in a professional respect'. The question is, not merely whether what a medical man has done would be an infamous thing for anyone else to do, but whether it is infamous for a medical man to do. An act done by a medical man may be 'infamous', though the same act done by anyone else would not be infamous; *but, on the other hand, an act which is not done 'in a professional respect' does not come within this section*. There may be some acts which, although they would not be infamous in any other person, yet if they are done by a medical man in relation to his profession, that is, with regard either to his patients or to his professional brethren, may be fairly considered 'infamous conduct in a professional respect', and such acts would, I think, come within section 29.

It should be noted that the conduct there in question was very different from the conduct with which the present case is concerned, and *was on the face of it quite plainly of an infamous, or for that matter disgraceful, character*; and the jurisdiction which the court was asked to exercise was the limited jurisdiction exercisable by way of control of the proceedings of a domestic tribunal, as distinct from the full appellate jurisdiction invoked in this case.

Granted that in accordance with Lord Esher's definition of 'infamous' conduct in a professional respect the full derogatory force of the adjectives 'infamous' and 'disgraceful' in section 25 of the Act of 1957 must be qualified by the consideration that what is being judged is the conduct of a dentist in a professional respect, which falls to be judged in relation to the accepted ethical standards of his profession, it appears to Their Lordships that these two adjectives nevertheless remain as terms denoting conduct deserving of the *strongest reprobation, and indeed so heinous as to merit, when proved, the extreme professional penalty of striking-off.*

To make good a charge of 'infamous or disgraceful conduct in a professional respect' in relation to such a matter as the keeping of the prescribed dental records *it is not, in Their Lordships' view, enough to show that some mistake has been made through carelessness or inadvertence* in two or even three cases out of (to quote the figures in the present case) 424 patients treated during the period in which the mistakes occurred, whether the carelessness or inadvertence consisted in some act or omission by the dentist himself or in his ill-advised delegation of the making of the relevant entries to a nurse or receptionist and omitting to check the forms to see that she had done as she was told. *To make such a charge good there must, in Their Lordships' opinion, (generally speaking) be some element of moral turpitude or fraud or dishonesty in the conduct complained of, or such persistent and reckless disregard* of the dentist's duty in regard to records as can be said to amount to dishonesty for this purpose. The question is to some extent one of degree, but in Their Lordships' view the cases of overcharging with which this appeal is concerned clearly fall short of the degree of culpability required.

(See also the Malaysian and Singaporean cases which define and adopt this

definition of 'infamous conduct': *Mohan a/l Rajadurai v Majlis Perubatan Malaysia* [1997] MLJU 236; [1998] 1 CLJ 903 at p 911 and *Low Cze Hong v Singapore Medical Council* [2008] 3 SLR 612).

[47] I agree with the defendant that when it comes to a specific profession, a man should be assessed by its 'own peers' and not the court by following the procedures.

[48] It has been held that at the end of the day it is the council and not the courts that have the professional expertise to determine whether the conduct of their peers fall within the contemplation of the words 'infamous conduct in any professional respect' appearing in s 29(2)(b) of the Act. The function of the council is to adjudicate, not to prosecute, a complaint of 'infamous conduct in any professional respect'. *In an appeal from the order made by the Council, the High Court can of course depart from the decision of the Council for cogent reasons*. Section 32(2) of the Act makes it clear that the High Court shall be the court of final appeal'. See the Federal Court in the case of *Dr Koay Cheng Boon v Majlis Perubatan Malaysia* [2012] 3 MLJ 173.

[49] Similarly, in *Keith Sellar v Lee Kwang Tennakoon v Lee Kwang* [1980] 2 MLJ 191, the court further stated the following:

> We feel bound to reiterate here that the legal profession is an honourable profession whose members are expected to conduct themselves honourably. The appellants here were dealt with in a proceeding by virtue of a statute enacted to govern the conduct of members of their profession. Moreover, they were tried by their own peers. *Members of the Disciplinary Committee were senior members of the profession who made firm findings of fact and they concluded that the appellants were guilty of misconduct in their practice as advocates and solicitors.* The Chief Justice stated in *Au Kong Weng*'s case that statutes relating to *the legal profession nor entrust the supervision of advocates and solicitors conduct to a committee of the profession, for it knows and appreciates better than anyone else the standards which responsible legal opinion demands of its own profession.*

[50] In *Marzaini bte Zainuddin v Majlis Peguam Negara* [2007] 8 MLJ 697; [2007] 10 CLJ 339 it has also been decided that members of the same profession are in the best position to decide as they know and appreciate better than anyone else the standards of conduct expected of the legal profession.

[51] The circumstances in which an appellate court can reverse a decision of a disciplinary committee has been set out in the case of *Libman v General Medical Council* [1972] AC 217 referred by the plaintiff, where it was held that it must be shown that either there was something clearly wrong with:

(a) the conduct of the trial;

(b) in the legal principles applied; and/or

(c) unless it can be shown that the findings of the committee were sufficiently out of tune with the evidence to indicate with reasonable certainty that the evidence has been misread.

[52] This has been applied in the Malaysian cases of *Dr Siti Aishah binte Abdullah v Majlis Perubatan Malaysia* [2011] 8 MLJ 845 at pp 852–853 and *Re Joseph Francis Lopez* [1976] 1 MLJ 161 at p 162.

[53] In this case upon considering the record of the inquiry held by the defendant on the plaintiff, the defendant's finding that the plaintiff to be guilty against the charge is based on the evidence and defence during the inquiries before the defendant. It is clear from the inquiry and in the plaintiff's own affidavit that the plaintiff admitted that the choice of words used in the medical report may not have been the best. The plaintiff clearly did not adduce sufficient evidence to state why such irrelevant statement was included in the medical report.

[54] In my considered opinion, the plaintiff had clearly breached the Code of Professional Conduct when the plaintiff who is a urologist and not trained or exposed in psychiatry field had made a statement that the complainant is suffering from a Munchausen syndrome. Accordingly, the plaintiff cannot make a diagnosis not within his field of specialty and should not have stated that the complainant has a marital problem solely by relying on the complainant's statements to the plaintiff that 'who doesn't have a marital problem'.

[55] I cannot disagree with the defendant that the record shows that the plaintiff had clearly admitted that such statement was not made in his professional opinion and the intention to alert the next physician was never demonstrated in his report. The defendant had clearly breached his code of conduct as a medical practitioner and the said medical report was never intended to alert the next physician as it was not addressed to specific physician to treat the said complainant and that the inclusion of the same in the report would enable the clinician to receive the best information available.

[56] As such, it is clear that a finding of misconduct must necessarily be a mistake by the practitioner where there was *carelessness or inadvertence* with some element of *moral turpitude or fraud or dishonesty* or such *persistent recklessness or disregard of his* duty as a medical practitioner. This should be read together in the context of when a medical report is issued, it must be found by the defendant that such statements made in the report is *untrue, misleading or improper.*

[57] It is trite that the burden of proof in such serious allegation needs to have a *high standard of proof*, and not make a finding of guilt on a balance of probabilities. See the case of *Wong Kok Chin v Singapore Society of Accountants* [1990] 1 MLJ 456.

[58] Similarly, the required standard of proof to be applied in a disciplinary proceedings concerning advocate and solicitor must be of beyond reasonable doubt as was held in *Keith Sellar v Lee Kwang Tennakoon v Lee Kwang* [1980] 2 MLJ 191 that:

> The second question is what burden of proof did the disciplinary committee apply in arriving at its findings. Looking at the grounds given in its statement of findings, the disciplinary committee although it made very firm findings unfortunately did not say expressly what standard of proof it adopted in arriving at its decision.
>
> First, what is the standard of proof required in such proceeding? Very recently, this court in *Au Kong Weng v The Bar Committee*, State of Pahang dealt with the same question and accepted the standard set by *Bhandari*'s case. Lord Tucker in that case approved the required standard established by the Court of Appeal in that in every allegation of professional misconduct involving an element of deceit or moral turpitude a high standard of proof is called for. The Court of Appeal also expressed the view that anybody of professional men sitting in judgment on a colleague should not be content to condemn on a mere balance of probabilities.
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> The standard of proof required in a proceeding of this type is proof beyond reasonable doubt. In the judgment of this court in *Au Kong Weng*'s case, the Chief Justice said:
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> > It is a question for the committee to decide, first, whether the facts alleged in the charge had been proved beyond reasonable doubt and secondly whether the appellant in relation to those facts, was guilty of such conduct. The absence in the committee's determination of any mention of the standard of proof does not justify an inference that it had failed to have regard to it.

[59] Further in the case of *Chong Chen Foh v Tan Lai Soon* [2012] MLJU 1345; [2013] 2 CLJ 78, the honorable judge followed the principle lain down in the case of *Keith Sellar v Lee Kwang Tennakoon v Lee Kwang* [1980] 2 MLJ 191 and held as follows:

> The DC found the appellant guilty of 'gross improper conduct' in the said land transaction and for having acted against the interest of the respondent. In view of the respondent's complaint to the DB, I agree with the submission of the appellant that the respondent's allegations concern deceit and moral turpitude and therefore the requisite standard of proof was beyond reasonable doubt ...

[60] In this case, I found that the defendant has carefully considered the oral and documentary evidence and made firm findings of facts based on the evidence presented before it. It cannot be said that the defendant has reached a

wrong decision simply because it has failed to mention the standard of proof in its finding. In the case of *Keith Sellar v Lee Kwang Tennakoon v Lee Kwang* [1980] 2 MLJ 191 referred above, it has also been held that the absence in the committee's determination of any mention of the standard of proof does not justify an inference that it had failed to have regard to it.

[61] In conclusion, the defendant's decision on the finding of guilt of the plaintiff was justified taking into account the evidence as a whole.

[62] The plaintiff in this appeal did include his alternative prayer that the sentence of a suspension of six months is grossly unjust and should be varied.

[63] In this regard, s 31(1) of the Act provides that:

> Any person who is aggrieved by the decision by any order made in respect of him by the Council in the exercise of its disciplinary jurisdiction may appeal to the High Court, and *the High Court may thereupon affirm, reverse or vary the order appealed against or may give such direction in the matter as it thinks proper* ...

[64] Section 30 gives the jurisdiction to the defendant to impose any of the punishment stated at paras (i)–(iv). In this case the plaintiff was punished under para (ii) of s 30 that his name be suspended from the register for six months. It is not disputed that the defendant chose to punish the plaintiff under s 30(1)(b)(ii) of the Act. The defendant can impose any period as it may think fit. The discretion is on the defendant however; in my view, the punishment meted out should take into consideration the circumstances of offence committed and facts of the case. The sentence to be imposed must also take into account the mitigating factor.

[65] It was stated in the mitigation that the plaintiff is the sole breadwinner for the family and he is the only urologist in Penang (mainland) and this is the plaintiff's first case since his housemanship in 1995. The charge against the plaintiff is related to the contents of a medical report that was issued to the complainant hence the choice of words could not be perfect. The plaintiff was also remorseful and regretted that the contents of the report had been misconstrued and that there is no malice intended. The plaintiff also assures the council that he will exercise caution in preparing medical reports in the future.

[66] In *Mohan a/l Rajadurai v Majlis Perubatan Malaysia* [1997] MLJU 236; [1998] 1 CLJ 903, the plaintiff was found guilty for failure to keep proper medical records constitutes 'infamous conduct' under s 29(2)(b) of the MA and the plaintiff was suspended for three months. Although in that case the court reversed the finding of guilt by the defendant on reason that any wrongful certification cannot be regarded as amounting to 'infamous or

A disgraceful conduct', for purposes of comparing the sentence meted out by the defendant in that case for the same finding of guilt in this case, the suspension from the register for six months, in my view is grossly unjust.

B **[67]** It is not disputed that the plaintiff was found guilty of infamous conduct mainly because the report has various statements which are unsubstantiated, misleading and/or improper eg marital problem and Munchausen syndrome. My view is, in the circumstances of the plaintiff's case and after considering that this is the plaintiff's first case and he has given his assurance that he will exercise caution in preparing medical reports in the C future and being remorseful, it does not warrant a suspension of six months from the register. The sentence is reduced to one month suspension from the register.

DECISION OF THIS COURT

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[68] This court will not disturb the finding of guilt by the defendant on the plaintiffs but vary the order on punishment by substituting the suspension for six months from the register to one month.

E *Finding of guilt by defendant on plaintiff affirmed; order on punishment varied by substituting suspension of six months from registrar to one month.*

Reported by Mohd Kamarul Anwar

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